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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 21

SEIU, UNITED HEALTHCARE WORKERS-WEST, Union, v. PARKVIEW COMMUNITY HOSPITAL MEDICAL CENTER, Employer.	No. 21-RC-121299 **SEIU, UNITED HEALTHCARE WORKERS-WEST'S ANSWERING BRIEF**

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I. INTRODUCTION

On August 29, 2014, Hearing Officer Jason E. Knepp issued his recommendations that the Employer's objections be overruled and that the Certification of Representation issue. SEIU, United Healthcare Workers-West's ("SEIU UHW" or "Union") submits this Answering Brief in Opposition to the Employer's Exceptions to Hearing Officer's Report and Recommendations, and the Employer's Brief in Support of Exceptions. Having lost the election, the Employer filed a number of baseless objections to the election and now has filed 121 baseless exceptions to the Hearing Officer's Recommendations. SEIU UHW acted lawfully and in accordance with the National Labor Relations Act ("Act" or "NLRA") throughout the critical period and did not interfere with the laboratory conditions of the election. Likewise, the agents of the National Labor Relations Board ("Board") did not engage in any conduct that interfered with the election.

The Hearing Officer's Recommendations should stand and a Certification of Representative should issue because the credible evidence presented at hearing established that the Union and the Board did not engage in any conduct that destroyed the necessary laboratory conditions required for a proper election. Indeed, the conduct that the Employer relied upon to support its objections did not, based upon applicable case law, amount to objectionable conduct. Moreover, any renumbering by the Hearing Officer of the Employer's objections as a result of withdrawal of certain objections after the hearing does not warrant sustaining the objections or setting aside the election. Accordingly, the Employer's exceptions should be dismissed.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The petition for election was filed on January 27, 2014. An election was held by secret ballot on March 13, 2014 among the employees in the bargaining unit listed in the stipulated election agreement.

The tally of ballots served by the parties at the conclusion of the election showed that of approximately 521 eligible voters, 251 cast ballots for, and 190 against, SEIU UHW, the Petitioner.

The objections sent to hearing were:

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1. In the polling area during the election, Petitioner Service Employees International Union, United Healthcare Workers-West (SEIU-UHW) ("Union"), acting through one or more of its observers, kept track, or created the appearance of keeping track, of those who had voted in the election on a written list.

2. During the election, the Union, acting through one or more of its representatives or agents, engaged in surveillance and/or created the impression of surveillance of and/or intimidated employees on their way into the polling place to vote by sitting in a car in a parking space close to the entry to the polling location and noting employees entering to vote.

3. During the election, the Union, acting through its agents and supporters, intentionally intimidated and interfered with voters attempting to access the polling area by line stacking, and forming fake lines, and thereby blocking access through the door to the polling area, resulting in an inability of voters in the line to vote.[1]

4. The Union misrepresented employees' support for the union, and interfered with the free-choice of employees, by distributing a flyer containing employee names and photographs without first obtaining consent.

5. The Union, acting through one or more of its representatives and agents, improperly promised to waive initiation fees and dues for the employee members of the organizing committee of the union.[2]

6. The Union improperly promised a monetary incentive of excessive value to employee members of the union organizing committee in order to get employees to sign authorization cards for the union.[3]

7. The Union improperly offered food to eligible voters on the day of the election in order to vote for the union.

8. The Union improperly promised on the day of the election to treat employees to an expensive victory party at an upscale restaurant.

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[1] The Employer withdrew Objection 3 after the hearing.

[2] The Employer withdrew Objection 5 after the hearing.

[3] The Employer withdrew Objection 6 after the hearing.

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9. The Union improperly conducted a contest among the employee members of the Union's organizing committee who collected the most signed and dated union authorization cards, and offered an extravagant raffle prize to the winner selected from among those who collected more than a particular number of cards.[4]

10. During one or more sessions of the election, the Union, acting through one or more of its observers, engaged in improper coercion by intimidating voters through threatening conduct when they gave their names to vote.

11. The Union interfered with the election and improperly affected the results of the election by engaging and intimidating home visits during the 24 hour period before the election and/or on election day.

12. During the first voting session of the election, the Union stationed more observers in the polling area than: (1) stationed by the Employer; and (2) were authorized by the Stipulated Election Agreement and the Regional Director's Determination, pursuant to Section 102.69(a) of the Board's Rules and Regulations that each party may have two (2) observers per each polling session.

13. Despite the provisions of the Stipulated Election Agreement and the Regional Director's Determination, pursuant to Section 102.69(a) of the Board's Rules and Regulations that each party may have two (2) observers for each polling session, the Board Agents allowed the Union to station more observers in the polling area than authorized by the Regional Director and stationed by the Employer.

14. The Board Agents conducting the election failed to properly supervise and control the ballots during the election in that, among other things, a ballot containing an unidentified individual's choice which had not been placed in the ballot box, was found in the tray of one of the voting booths and instead placed in an anonymous challenged ballot envelope.[5]

15. The Board Agents conducting the election failed to properly supervise and control the excelsior list in that an individual cast an unchallenged ballot under another employee's name.

[4] The Employer withdrew Objection 9 after the hearing.

[5] The Employer withdrew Objection 14 after the hearing.

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The actual employee whose name had been checked off as already having voted had to cast a challenged ballot in light of this wrongdoing.

16. After the Regional Director of Region 21 directed the Board Agents to require identification from any voter unknown to the observers of both parties, one of the Board Agents told an observer that it did not matter that one of the subsequent voters did not have identification.

17. The Board Agent failed to maintain a minimum laboratory conditions necessary for a free and fair election by failing and/or refusing to supervise or control the union agents and supporters who are congregating outside the entrance of the polling location throughout the day of the election.

18. The conduct of the Board Agents conducting the election, described in Objections 13, 14, 15, 16, and 17, above, either singularly or collectively, destroyed the minimum laboratory conditions necessary for a free and fair election, interfered with the employees' ability to exercise a free and uncoerced choice in the election, and interfered with the conduct of the election.

19. The Union or the NLRB engaged in additional improper or objectionable conduct interfering with the election or rendering a free and fair election impossible.[6]

The Regional Director issued a report on objections and ordered directing hearing and notice of hearing. See, Board Exhibit 1(a).

The hearing was held in Los Angeles, California in Region 21, before Hearing Officer Jason Knepp. The hearing was held on June 3, 4, 5, 6, 9, 10 and 11, 2014. After the hearing, the parties filed post-hearing briefs. Having presented no evidence to support certain objections, the Employer withdrew Objections 3, 5, 6, 9, 14 and 19.

On August 29, 2014, the hearing Officer issued his recommendations overruling the Employer's objections in their entirety and recommending that a Certification of Representative issue. On September 24, 2014, the Employer filed its Exceptions to the Hearing Officer's Recommendations and Brief in Support of Exceptions.

[6] The Employer withdrew Objection 19 after the hearing.

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III. ARGUMENT

A. STANDARD FOR ELECTION OBJECTIONS

The critical period during which the Board generally considers objectionable representation election conduct "commences at the filing of the representation petition and extends through the election." *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961); *E.C. Electric, Inc.*, 344 NLRB 1200, 1204 n. 6 (2005). In this case, that period is from January 27, 2014 to March 13, 2014.

As a general matter, the burden of proof on parties seeking to have a board-supervised election set aside is a "heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989). The parties attacking the election results bears a "heavy burden of demonstrating that the alleged objectionable conduct reasonably tended to interfere with the employees' free and uncoerced choice in the election." *Trump Plaza Associates*, 352 NLRB 628, 630 (2008), adopted and incorporated in *Trump Plaza*, 355 NLRB 202 (2010). This is even more so "[i] and representation proceedings where, as here, there has been no unfair labor practice allegation or finding." *Veritas Health Svcs.*, 2009 WL 13654 (Jan. 16, 2009).

In determining whether the conduct has the tendency to interfere with the employees' freedom of choice, the Board considers: 1) the number of incidents; 2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; 3) the number of employees in the bargaining unit subjected to the misconduct; 4) the proximity of the misconduct to the election; 5) the degree to which the misconduct persists on the minds of the bargaining unit employees; 6) the extent of dissemination of the misconduct among the bargaining unit employees; 7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; 8) the closeness of the final vote; and, 9) the degree to which the misconduct can be attributed to the party. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004), cited *Taylor Whrton Division Harsco Corp.*, 336 NLRB 157, 158 (2001); see also *Harsco Corp.*, 336 NLRB 9 (2001) at 3.

Here, the Hearing Officer's recommendation to overrule the Employer's objections in their entirety is appropriate because the evidence presented at hearing did not factually support

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any of the alleged objectionable conduct, and, the alleged conduct, as a matter of law, is not objectionable. Accordingly, the Employer's exceptions should be dismissed.

B. THE HEARING OFFICER CORRECTLY RECOMMENDED TO OVERRULE OBJECTION NO. 1 BECAUSE THE UNION OBSERVER DID NOT KEEP TRACK OF VOTERS AND ANY APPEARANCE OF KEEPING TRACK WAS *DE MINIMIS*.

Contrary to the Employer's claims in its Exceptions and Brief in Support of Exceptions, the Hearing Officer correctly ruled that the evidence presented at hearing did not support a finding that the Union's observer, Jonathan Maya, kept track of voters or that he created the impression of keeping track of voters based on his making of marks on his list of voters to be challenged. (Hearing Officer Recommendations p. 8.) First, it is permitted for observers to keep lists of voters to be challenged. *Cerock Wire & Cable Group,* 273 NLRB 1041 (1984). And, while the Board prohibits the keeping of a list, apart from the official voting list, of persons who have voted in the election, it is necessary to affirmatively show or to infer from the circumstances that the employees knew that their names were being recorded. *Days Inn Management Co.,* 299 NLRB 735 (1992); *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994). Relying on this standard, the Hearing Officer correctly ruled that based on the lack of evidence showing that any voter was aware of any markings made by Maya on the challenge list any violation of the rule prohibiting lists of persons who have voted was *de minimis* and did not warrant setting aside the election. (H.O. Rpt. p. 8.)

Specifically, the evidence presented at hearing demonstrated that Union observer Jonathan Maya was seen marking a list on his lap that he maintained of the voters to be challenged by the Union. The evidence is undisputed, as Employer and Union witnesses testified alike, that there were no employees/voters present when Maya was seen marking his list and that when the Board Agent admonished Maya, he complied with the Board Agent's instructions and stopped marking the list. (TR. 462:24-25; 464-465; 481-483; 1536-1537.) These facts demonstrate that any markings made by Maya to the challenge list did not affect the outcome of the election and the Hearing Officer correctly ruled that this conduct did not constitute grounds for setting aside the election.

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In recommending that Objection No. 1 be overruled, the Hearing Officer correctly cited the Board's decision in *Tom Brown Drilling Co.,* 172 NLRB 1267 (1968). (H.O. Rpt. p. 8.) In *Tom Brown Drilling Co.,* an employer observer began checking names of voters on a list among names to be challenged but discontinued when warned against it by the Board agent and it was not clear that any voter was aware his name was being checked off. The board in *Tom Brown Drilling* concluded that any breach of the rule which may have occurred was *de minimis* and did not constitute as a basis to set aside the election. Therefore, because the Hearing Officer correctly found that there was no basis to set aside the election based on Maya's conduct, the Employer's exceptions should be dismissed.

C. THE HEARING OFFICER CORRECTLY RECOMMENDED THAT OBJECTION NO. 2 BE OVERRULED BECAUSE THE PRESENCE OF THE UNION REPRESENTATIVE ALONE WITHOUT EVIDENCE THAT THE UNION ENGAGED IN SURVEILLANCE OR INTIMIDATED VOTERS IS NOT GROUNDS TO SET ASIDE AN ELECTION.

The Hearing Officer correctly found that Union Representative Daniel Lopez's conduct of sitting in a car parked in a parking lot outside of the building where the polling was located was not objectionable conduct and, therefore, properly recommended that Objection No. 2 be overruled. (H.O. Rpt. p. 10.) Contrary to the Employer's Exceptions, the evidence presented at hearing did not demonstrate that the Union, through Daniel Lopez, engaged in surveillance or created the impression of surveillance and/or intimidated employees on their way into polling locations by sitting in a car outside of the building where employees went to vote. And, the Employer's Exceptions based on the Hearing Officer's alleged "grossly exaggerated" estimate of the distance between Daniel Lopez's car and the entrance to the Founder's Center does not merit a finding of objectionable conduct.

First, the Hearing Officer properly distinguished the facts in *Performance Measurements Co., Inc.,* 148 NLRB 1657 (1984), a case relied upon by the Employer, from the facts in this matter. In *Performance Measurements,* the employer's president stood by the door to the election area so that it was necessary for each employee who voted to pass within two feet of him to gain access to the polls. However, in this matter, the Hearing Officer correctly found that David Lopez's presence in the parking lot was "much less conspicuous than that of the employer official

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in *Performance Measurements.*" (H.O. Rpt. at 10.) Indeed, if the Employer's account of the facts are true, Daniel Lopez was sitting several feet from the entrance to the building where the election was taking place. (Employer Exhs. 21, 23, 24, and 25.)

Second, the Hearing Officer properly relied upon the Board's decision in *C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011), finding that a union agent's presence near the polls alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election. Every witness who testified to allegedly seeing Union organizer Daniel Lopez sitting in a car parked in front of the Founder's Center stated that they did not see or could not see what he was doing. For example, the Employer offered Dee Dee Olivarez to testify in support of this objection. She testified that she saw a man who looked like Union organizer Daniel Lopez sitting in his car but did not see what he was doing. (TR. 521:12-21; 522:18-21, 24-25; 525:6-8.) The Employer also offered Wayne Charles Rowzee to testify and he testified similarly that he saw Daniel Lopez sitting in a black Honda Civic facing the Founder's Center but did not see him doing anything. (TR. 731:18-25; 732:1-12, 15-18; 733:1-5.) The Hearing Officer relied on the testimony of Olivarez and Rowzee to properly find that the conduct by Daniel Lopez was not objectionable. And, while, Mr. Lopez credibly testified that he was not sitting in a car parked in front of the Founder's Center on the day of the election and that he does not own a black Honda Civic, (TR. 1663:15-18; 1664:4-7), the Hearing Officer did not find it necessary to resolve the credibility issues because the conduct was not objectionable.

Thus, contrary to the Employer's Exceptions, the evidence did not demonstrate that the Union engaged in, or created the impression of, surveillance of voters entering the polling locations, and the conduct engaged in did not constitute objectionable conduct. Accordingly, the Employer's exceptions should be dismissed.

D. THE HEARING OFFICER PROPERLY RECOMMENDED THAT OBJECTION NO. 4 (RENUMBERED OBJECTION 3) BE OVERRULED BECAUSE THE UNION FLYER IS MERE MISREPRESENTATION AND NOT OBJECTIONABLE CONDUCT.

The Employer ridiculously claims in its Exceptions that the Union engaged in "pervasive misrepresentation and artful deception." (Employer's Brief in Support of Exceptions p. 25.) The

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Employer's claims are absolutely baseless and the "prevalent" distribution of a four-panel flier – with a removable sticker – without more, does not constitute objectionable conduct. Indeed, the Hearing Officer properly concluded that Objection No. 4 (renumbered Objection No. 3 by the Hearing Officer) alleging that the Union misrepresented employee support for the union, and interfered with the free choice of employees, by distributing a flyer containing employee names and photographs without first obtaining consent, should be overruled. (H.O. Rpt. pp. 12-13.) The Hearing Officer properly applied the Board's standard in *Midland National Life Insurance Co.,* 263 NLRB 127 (1982) to the Employer's claims of alleged campaign misrepresentation by the Union. Based on *Midland,* the Board will not set aside an election based on misrepresentations unless "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland*, 263 NLRB at 133.

The record demonstrates that the depiction of employees on the Union's flyer (ER Ex. 16-17) is mere misrepresentation and not objectionable because the record is void of any evidence of forgery. Here, the Employer presented hearsay evidence of an overheard conversation between Megan Maribel and an unnamed Union representative regarding having her picture depicted in a Union flyer. (TR. 331: 12-25; 333:6-9; 334:9-14; 19-25.) The flyer was distributed at the Hospital with a piece of purple tape covering the picture with Megan Maribel. (TR. 336: 17-20.) Union witness Stefanie Cumpton testified that she took the picture of her niece Megan Maribel ("Maribel") depicted in the Union flyer; that she took the picture with Maribel's consent and that Maribel knew that the picture was going to be used on a Union flyer and that it was "going public". (TR. 1347:17-20; 1349:2-13, 23-25; 1351:18-25; 1352:1-17; 1353:2-10.) Cumpton further testified that sometime after the picture was taken, Maribel changed her mind about having her picture on a Union flyer and that Cumpton told her Union organizer, Kassie. (TR. 1353:13-25; 1354:1-19.) Witnesses, including Cumpton, testified that she later learned that the flyer was printed with Maribel's picture and that it was too late to remove the photograph so the Union decided to cover up the Maribel's photograph with a piece of purple tape and that the flyer with the tape was the flyer that was distributed at the Hospital on or before the day of the election. (TR. 1355:1-3, 13-25; 1356:1-19, 25: 1357:1-25; 1358:1-2, 8-22; TR. 1640:11-22.)

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Similar evidence was presented regarding alleged misrepresentation of Union support by depicting a photograph of employee Sonya Booker with her co-workers on two Union flyers. Booker testified that she posed for the photograph but that she did not know it would be used for a Union flyer and that she never gave consent to have her photograph used. (TR. 787-792 .) Three other employees, Alice Verano, Maria Murillo, and Maria Martinez, testified that they were present when the photograph was taken, that Booker agreed to be in the photograph, and Booker knew that the picture would be used to show Union support. (TR. 1276-1282; 1593-1596; 1616-1619.)

The Hearing Officer also applied the Sixth Circuit's decision in *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984) to these facts and found no objectionable conduct. In *Van Dorn* the Sixth Circuit held that "[t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." 736 F.2d 343, 348 (6th Cir. 1984). However, even the Sixth Circuit in *Van Dorn* agreed that the Board should not set aside an election on the basis of the substance of representations, but "only on the deceptive manner in which representations are made." *Id.* citing *Midland National Life* at 131.

The Hearing Officer correctly relied on the Board's recent decision in *Durham School Services, LP and International Brotherhood of Teamsters, Local 991,* 36 NLRB No. 108 (May 9, 2014), to find that the flyer was union campaign propaganda and not objectionable conduct. Indeed, the Hearing Officer properly found that the facts in *Durham School Services, LP,* were "closely parallel" to the facts in this matter. (H.O. Rpt. 13.) In that case, the Board reaffirmed that, "[i]t is well established that the *Midland* standard applies where unions circulate campaign literature that identifies particular employees as union supporters, as well as attributing pro-union statements, to them or representing that they intend to vote for the union". *Durham School Services, LP and International Brotherhood of Teamsters, Local 991,* 36 NLRB No. 108 (May 9, 2014), citing *see, e.g., Somerset Valley Rehabilitation & Nursing Center,* 357 NLRB No. 71 (2011) (overruling objection where a union arguably misrepresented quotes from two employees);

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BFI Waste Services, 343 NLRB 254 (2004) (overruling objection where a union arguably misrepresented quotes from two employees); *Champaign Residential Services,* 325 NLRB 687 (1998) (overruling objection where a union, at most, misrepresented that two employees would vote for it). "As the Board has explained when uniformly rejecting election objections based on such literature, employees can 'easily identify [it] as campaign propaganda.'" *Id.* The Board in *Durham* concluded that it would have reached the same result even applying the *Van Dorn* standard. Thus, the Hearing Officer properly recommended to overrule Objection No. 4 (renumbered as No. 3) and the Employer's exceptions should be dismissed.

E. BECAUSE THE EMPLOYER DID NOT RAISE EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDATIONS TO OVERRULE OBJECTIONS 7, 8, AND 10 (RENUMBERED 4, 5, AND 6) THOSE OBJECTIONS SHOULD BE OVERRULED.

The Hear Officer recommended that Objections 7, 8 and 10 be overruled in their entirety. (H.O. Rpt. pp. 13 – 17.) Because the Employer did not file exceptions to the Hearing Officer's recommendations to overrule Objections 7, 8, and 10 (renumbered 4, 5 and 6), those objections should be overruled.

F. THE HEARING OFFICER'S RECOMMENDATION TO OVERRULE OBJECTION 11 (RENUMBERED AS OBJECTION 7) IS PROPER BECAUSE THE UNION'S GET OUT THE VOTE EFFORTS AND HOME VISITS DO NOT CONSTITUTE OBJECTIONABLE CONDUCT.

The Hearing Officer correctly found that the home visits conducted by the Union did not constitute coercion or intimidation. (H.O. Rpt. 20.) And, properly found that the conduct by the Union during the home visits does not warrant setting aside the election. (*Id.*) As correctly noted by the Hearing Officer, home visits by union representatives is not in and of itself coercive and the basis for setting aside an election. *Canton, Carp's, Inc.,* 127 N.L.R.B. 513 n.3 (1960).

In *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011 (9th. Cir. 1981), the court found that a union representative's and union supporter's repeated visits to an employee's home, the last of which took place just two days prior to the election, for the purpose of recruiting the employee to vote for the union did not constitute evidence of intimidation. *See Id.* at 1019. In fact, it is well established that home visits during the critical period are one means through which a union can

communicate with workers to convey its message. *See Sabine Towing & Transp. Co. v. NLRB*, 599 F.2d 663 (5th. Cir. 1979). And, unlike employers, unions may visit employees in their homes. *Randell Warehouse of Arizona. Inc.*, 347 N.L.R.B. 591, 596 (2006). Home visits by union representatives are unobjectionable so long as they are unaccompanied by threats or other coercive conduct. Moreover, in *Excelsior Underwear*, 156 NLRB 1236 (1966) the Board found that an Employer is required to provide the union with a list of its employees names and addresses, and in doing so, expressly contemplated that such list will be used to communicate with employees in their homes. *Id.* at 1239-1240, 1244.

Here, the testimony of Jesus Aguirre and Daniela Onyisa in no way demonstrated any threatening or coercive conduct on the part of Union. Aguirre, for example, voluntarily went to vote with his co-worker and the Union organizer, even taking his younger sibling and nephew. (TR. 1002-1007.) Likewise, the Employer's claims that the Union organizer's offer to accompany Onyisa to vote was "excessive" and "coercive" are unfounded. Indeed, Onyisa testified that she freely voted, notwithstanding the Union organizer's offer to accompany her to vote. Accordingly, the Hearing Officer properly recommended to overrule this objection and the Employer's exceptions should be dismissed.

G. THE HEARING OFFFICER'S RECOMMENDATION TO OVERRULE OBJECTIONS NOS. 12 AND 13 (RENUMBERED 8 AND 9) SHOULD BE UPHELD BECAUSE THE UNION DID NOT STATION MORE THAN TWO OBSERVERS IN EACH POLLING SESSION.

The Employer ridiculously claims that the Union had more observers in the polling area than authorized and that the Board Agents allowed this conduct. (Employer's Brief at 22.) The Employer's objections and exceptions are frankly ludicrous. As the Hearing Officer correctly found (and as supported by the undisputed evidence presented at the hearing) at no time did the Union have more observers than the Employer. (H.O. Rpt. p. 21.)

Each party is permitted to be represented at the polling place by an equal pre-designated number of observers. *Best Products Co.*, 269 NLRB 578 (1984). Here, pursuant to the terms of the stipulated election agreement each party was to have two observers during each polling session. The Employer claims that by allowing the Union to switch out observers half-way

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through the polling session that this somehow resulted in the Union having more observers than the Employer. However, as the Hearing Officer properly found, the evidence was undisputed that the switch-out did not take more than a few seconds and that the voting was not interrupted or in any way disrupted during the switch-out. (TR. 1441:18-25; 1442:1-25.) For example, Gloria Gomez testified that she was present during the observer switch where Alice stepped in for Stefanie. (TR. 1443:23-25; 1444:1-9.) Gomez testified that there were no voters in the room during the switch and that it only took a couple of seconds for the switch to take place. (TR. 1444:10-12; 1445:1-13.) And, Gloria Gomez served as an observer during the first session and attended the meeting before the session in which the Hospital's lawyer agreed to the switch. (TR. 1461-1462.) Employer witness Liset Ayala testified that during the polling session in question there were two observers for the Union, but at one point, one of them was switched-out for a different observer. (TR. 276: 16-277:6.)

The facts here are different from those in *Summa Corp. v. NLRB*, 625 F.2d 293 (9th. Cir. 1980). There, the Union had an extra observer throughout the voting session, which was deemed objectionable conduct. *See Summa Corp.,* 625 F.2d at 295. Here, even an Employer witness, Shannon Kidwell, testified that the "switch-out" took thirty seconds, (TR. 678: 8-11), and that the observer being replaced left directly afterwards. (TR. 678: 16-17.) This factual distinction is critical since here, as a result of the fact that the extra observer was not present throughout the voting period, no impression of predominance on the part of the union and partiality on the part of the Board was created. As such, the conduct complained of in objection 13 did not warrant setting aside the election.

The Employer's exceptions to the Hearing Officer's recommendation to overrule Objections Nos. 12 and 13 (renumbered 8 and 9) are based on speculation and conjecture. The Hearing Officer properly found that the "switch-out" was more akin to a situation where a designated observer arrives when after the polls have opened and the Board Agent can position or instruct the late observer with minimal interruption or no interruption of the polling, citing *Inland Waters Pollution Control, Inc.*, 306 NLRB 342 (1992). Accordingly, the Employer's exceptions should be dismissed.

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H. THE HEARING OFFICER PROPERLY RECOMMENDED TO OVERRULE OBJECTIONS 15, 16, 17, AND 18 (RENUMBERD AS 10, 11, 12, AND 13) BECAUSE THE BOARD AGENT CONDUCT COMPLAINED OF DOES NOT WARRANT SETTING ASIDE THE ELECTION.

Objections 15, 16, 17, and 18 (renumbered by the Hearing Officer as 10, 11, 12 and 13) contend that the conduct of the Board Agents somehow affected the outcome of the election. These objections are baseless and the Hearing Officer properly found that the Board Agent conduct complained of did not warrant setting aside the election. A party seeking to have a Board-supervised election set aside bears a heavy burden of proof. *Health Care & Retirement Corp. of Am. v. NLRB*, 255 F.3d 276, 280 (6th. Cir. 2000). This burden is not met by proof of misconduct, rather, specific evidence is required showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. *Id.*

During an election, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions that are as ideal as possible, to determine the uninhibited desires of the employees. *See Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 396 (5th. Cir. 1969). Thus, in applying the "laboratory conditions" test, the critical determination is whether the employees were permitted to register a free choice. *Home Town Foods*, 416 F.2d at 396. For this reason, the board must maintain and protect the integrity and neutrality of its procedures in conducting elections. *U.S. Ecology, Inc. v. NLRB*, 772 F.2d 1478, 1782 (9th. Cir. 1985). The Board has stated that conduct by a Board agent will warrant setting aside an election where such conduct tends to destroy confidence in the Board's election process, or could reasonable be interpreted as impugning the election standards. 4 N. Peter Lareau, *National Labor Relations Act: Law & Practice* § 32.08[1] (2014). Thus, the "laboratory conditions" are violated where Board agent conduct has demolished confidence in the Board's neutrality and integrity of its election procedures. *See NLRB v. Osborn Transp.,Inc.*, 589 F.2d 1275, 1280 (5th. Cir. 1979).

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1. Because the Employer Did Not Prove Voter Fraud or the Appearance of Voter Fraud, the Hearing Officer Properly Overruled Objection No. 15 (Renumbered 10).

The Hearing Officer correctly overruled objection 15 where the Employer alleged voter fraud based on one incident involving, Melody Garcia, a voter who was allowed to vote challenged even though her name was already crossed off of the Excelsior List. (H.O. Rpt. 26.) This was an isolated incident that, given its timing, was not sufficient to create doubt in the minds of the employees regarding the impartiality of the Board agents, the validity of the election, or the integrity of the election process. Instead, as correctly found by the Hearing Officer, the fact that Melody Garcia's name was crossed out when she came to vote was likely an administrative error and not evidence of voter fraud.

While the Employer attempted to show "voter fraud" based on hearsay testimony of Employer observers, and continues to argue that there was an appearance of voter fraud in its Exceptions based on hearsay testimony of witnesses who each claim to have observed certain employees in the polling area during the time in which they each served as observers, the evidence is void of any actual evidence of voter fraud. Moreover, this testimony was directly contradicted by testimony by almost every single one of those very individuals accused of voting more than once. Each of these employees testified under oath that they only voted once. (TR. 1129: 15-16; 1140: 11-18; 1148:15-16; 1189: 24-25.) Thus, the Hearing Officer's recommendation to overrule this ridiculous objection is proper and the Employer's Exceptions should be dismissed.

2. The Hearing Officer Properly Recommended to Overrule Objection No. 16 (Renumbered as 11).

The Hearing Officer's recommendation to overrule objection 16 is appropriate. As the Hearing Officer properly found, the fact that the Board agent told an observer that it did not matter if voters did not have identification subsequent to the Regional Director's direction that identification should be required and the subsequent gesture is not conduct that warrants setting aside the election. (H.O. Rpt. 27-28.) The Employer's Exceptions to the Hearing Officer's recommendation based on categorizing the testimony of employee Sandra Lee Buehlye as hearsay does not warrant overturning the Hearing Officer's recommendation. The alleged

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statement by the Board Agent did not in any way reflect bias or impropriety or in any way impugn the integrity of the Board's election procedures in the eyes of the employees. On cross examination, Ms. Buehlye testified that she was able to vote and that she was wearing her employee identification badge. Thus, the Hearing Officer properly recommended to overrule Objection No. 16 (renumbered as 11.)

3. The Hearing Officer Correctly Recommended to Overrule Objection No. 17 (Renumbered as 12).

The Board has held that the mere presence of pro-union employees near the voting area does not destroy the laboratory conditions for an election. Instead, in those cases where the courts have set aside an election due to electioneering near the voting area, there was, typically, clear evidence of supporters of one of the parties speaking to people waiting to vote or engaging in some other conduct explicitly encouraging people to vote for one side or the other. *See NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111, 112-13 (5th. Cir. 1981); *see also Claussen Baking Company*, 1134 NLRB 111, 112 (1961). The Fifth Circuit has held that *Carroll Contracting* is not controlling where electioneering is not directed at voters waiting in line to vote. *Amalgamated Service*, 815 F.2d at 231 (citing *Boston Insulated Wire & Cable Systems, Inc. v. NLRB*, 703 F.2d 876 (5th. Cir. 1983).

In objection 17, the Employer contends that the Board agents' failed to control the Union's supporters who congregated near the building where the polling area was located and communicated with employees coming to vote. The Hearing Officer properly found that the Employer failed to present any evidence that the individuals congregating outside of the building engaged in any campaign activity and failed to show that the Union was included in the congregation of individuals outside the building. (H.O. Rpt. 30.) Thus, the Hearing Officer correctly concluded that based on the absence of evidence of electioneering or improper conduct by employees in the polling area, the mere presence of employees did not warrant setting aside the election.

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4. The Hearing Officer Properly Recommended to Overrule Objection No. 18 (Renumbered as 13).

In objection 18 (renumbered as 13), the Employer contends that the Board agent's conduct described in objections 13-17, either singularly or collectively, destroyed the minimum laboratory conditions necessary for a free and fair election. Because the Employer failed to establish that the conduct complained of in each of those objections prevented the employees from registering a free choice, objection 18 was properly overruled by the Hearing Officer. (H.O. Rpt. pp. 30-31.)

As a whole, the Board agent conduct complained of did not destroy confidence in the board's neutrality or the integrity of its election procedures. Thus it does not warrant setting aside the election. Furthermore, the conduct complained of in those objections did not prevent the employees from registering a free choice. Therefore, the Hearing Officer properly ruled that the Board Agent conduct it did not destroy the minimum laboratory condition necessary to conduct a free and fair election.

IV. CONCLUSION

The Employer lost the election and there was no objectionable conduct that warrants setting aside the election. Neither the Union, its agents, its observers or the Board Agents engaged in any conduct that merits setting aside the election. Based on the foregoing, the Employer's Exceptions should be dismissed in their entirety and the Hearing Officer's recommendation to overrule all of Employer's objections and certify the election should stand.

Dated: October 15, 2014

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PROOF OF SERVICE

I am a citizen of the United States and an employee in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 800 Wilshire Boulevard, Suite 1320, Los Angeles, California 90017.

On October 15, 2014, I served upon the following parties in this action:

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copies of the document(s) described as:

SEIU, UNITED HEALTHCARE WORKERS-WEST'S ANSWERING BRIEF

[X] BY EMAIL I caused to be transmitted each document listed herein via the email address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Los Angeles, California, on October 15, 2014.

Guadalupe Issa